NO. 86-1592

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

RICHARD M. MADDOX,

PETITIONER,

v.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA AND
THE COURT OF CRIMINAL APPEALS
OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF -
DON SIEGELMAN
ATTORNEY GENERAL,

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
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QUESTIONS PRESENTED

1. Does a state convict have a right under the United States Constitution to comparative proportionality review of a non-capital sentence?

2. Does a person, who is convicted of trafficking in controlled substances and who is sentenced in accordance with the statute to fifteen (15) years imprisonment, the same being subject to "good time" allowances of two and a half (2.5) times credit for time actually served and also subject to parole after three (3) years service (1.2 years with full good time credit), have any basis for claiming that his sentence is constitutionally disproportionate in light of the sentences subsequently received by his co-defendants pursuant to plea bargains?

THE PARTIES

In the Circuit Court of Coosa County, Alabama, the Court of Criminal Appeals of Alabama, the Supreme Court of Alabama and a former proceeding in this Honorable Court, involving an unrelated issue, the parties were Richard M. Maddox, Vickie Ellen Callahan and Gary Dean Gillum, as Defendants, Appellants and Petitioners, respectively, the said Richard M. Maddox being Petitioner herein, and the State of Alabama, as Plaintiff, Appellee and Respondent, respectively, said State being Respondent herein.

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OPINIONS BELOW

The decisions and opinions of the Alabama appellate courts have not as yet been reported, but will be reported as follows:

Maddox, et. al. v. State, _So.2d_ (Ala.Crim.App, June 11, 1985)

A copy of the same is appended to the Petition.

Ex parte Maddox, et al.; In Re: Maddox, et al. v. State, _So.2d_ (Ala, April 25, 1986)

A copy of the same is also appended to the petition.

Maddox v. State, __So.2d__ (Ala.Crim.App, Sept. 9, 1986)

A copy of the same is also appended to the petition.

Ex parte Maddox; In Re: Maddox v. State, __So.2d__(Ala, Jan. 30, 1987)

A copy of the same is also appended to the petition.

The denial of review by this Honorable Court in a former proceeding on an unrelated issue, is reported as follows:

Maddox, et al v. Alabama, __U.S.__, __L.Ed.2d__,107 S. Ct. 404 (1986)

JURISDICTION

The petitioner has invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVSISIONS INVOLVED

The Petitioner is raising an alleged claim under the Eighth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

The Petitioner was convicted and sentenced for trafficking in cannabis under Title 20, Section 20-2-80(1)(a), Code of Alabama, 1975, which reads as follows:

> §20-2-80. TRAFFICKING IN CANNABIS, COCAINE, ETC.; MANDATORY MINIMUM TERMS OF IMPRISONMENT.
>
> "Except as authorized in chapter 2, Title 20:

"(1) Any person who knowingly sells, manufactures, delivers or brings into this state, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2. pounds of cannabis is guilty of a felony, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

"a. Is in excess of one kilo or 2.2 pounts, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $25,000.00...."

STATEMENT OF THE CASE

Although the appeals of Vickie E. Callahan and Gary Gillum, originally consolidated with the instant case, were finally diposed of by the Alabama Supreme Court in Ex parte Maddox, et al., (_So.2d_ [Ala. April 25, 1986]; cert. den. __U.S.__ __L.Ed.2d__, 107 S. Ct. 404 [1986]), matters from the records in those cases are relevant to the instant proceedings. Therefore,

throughout this brief all record references will be prefaced by the relevant convict's surname.

Petitioner Maddox and one Gary Gillum were indicted by the Grand Jury of Coosa County for trafficking in marijuana[1], and one Vickie Ellen Callahan was indicted for simple possession of marijuana[2] (Maddox, R-503; Gillum, R-24; Callahan, R-24)

---

[1]Section 20-2-80(1)(a), Code of Alabama, 1975; quoted at pages 3-4, above.

[2]Section 20-2-70(a), Code of Alabama, 1975, which reads in pertinent part, as follows:

> §20-2-70. Prohibited acts A.
>
> "(a) Except as authorized by this chapter, any person who possesses...controlled substances enumerated in schedules...I, II, III, IV and V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two or more than 15 years and, in addition, may be fined not more than $25,000.00. ..."

On November 29, 1982, Maddox went to trial on the indictment and his plea of not guilty and was convicted of trafficking in marijuana as charged in the indictment. (Maddox, R-491). Based on the facts that (1) it was the second time Maddox had been caught in such an operation and (2) Maddox was spending far more than his visible income, the pre-sentence report recommended

> "...[T]hat Maddox receive a more than average Penitentiary [sic] sentence for this offense..." (Maddox R.pp.518-519)

At the sentence hearing held in the Circuit Court on February 18, 1983, Maddox did not contest the pre-sentence report nor offer any evidence or argument, except some letters, which are not part of this record. He was sentenced to fifteen (15) years imprisonment. (Maddox, R-480-486, R-491 and R-493).

Over nine (9) months later, Gillum entered a written plea bargain with the State, under which he agreed to plead guilty to trafficking in marijuana, and the State agreed to recommend a sentence of four (4) years imprisonment. On the same date Callahan entered a similar agreement; she agreed to plead guilty to possession of marijuana, and the State agreed to recommend three (3) years imprisonment. On June 15, 1984, the Court accepted Gillum's and Callahan's guilty pleas and the State's sentence recommendations. (Gillum, R-52-53, 55 & 56; Callahan, R-53-56).

All of these parties appealed to the Court of Criminal Appeals of Alabama claiming illegal search and seizure. Maddox also complained that his sentence was disproportionate in comparison to those of Gillum and Callahan. On June 11, 1985, the Court of Appeals affirmed the convictions and sentences.

(Maddox, et al, v. State, __So.2d__ [Ala.Crim. App, June 11, 1985])

On certiorari, the Supreme Court of Alabama affirmed as to the convictions, but as to Maddox's sentence, ruled and wrote:

> "...Maddox received the maximum[3] sentence allowed by law for his first[4] felony conviction, while Gillum and Callahan received a four-year sentence and a three-year sentence, respectively. The potential excessiveness of Maddox's sentence requires a review pursuant to the Eighth Amendment. Because the Court of Criminal Appeals did not address this issue, we must remand this cause to that Court with directions to consider this cause in

---

[3]The Court apparently thought that Maddox was convicted of possession of marijuana (Section 20-2-70[a], note 2, page 5, above). There is no provision for a maximum sentence for trafficking in cannabis, under Section 20-2-80(1)(a). (Pages 3-4, above).

[4]Maddox had, however, been convicted in 1975 of possession of marijuana incident to a scheme similar to this one. (Maddox, R-519) "... Following an unfavorable pre-sentence report, Maddox was sentenced to fifteen years..." (Maddox v. State, __So.2d__ [Ala.Crim.App, June 11, 1985], Mns. op.p.2, emphasis supplied).

light of Solem v. Helm, supra. It is so ordered.

"... REMANDED WITH DIRECTIONS. (Ex parte Maddox, et al, __So.2d.__[Ala, April 25, 1986])

The State applied for rehearing pointing out:

1. Sentences of guilty pleading co-defendants are universally held by the courts to be irrelevant to the propriety of the sentence of one who goes to trial.

2. These is no U.S. Constitutional right to comparative proportionality.

3. In light of applicable "good-time" and parole provisions any suggestion that Maddox's sentence is disproportionate is frivolous.

On June 13, 1986, the Supreme Court denied rehearing without opinion.

On remandment, the State made the same arguments which it had advanced on rehearing in the Alabama Supreme Court. On September 9, 1986, the Court of Criminal Appeals of Alabama affirmed Maddox's sentence. On authority of

this Honorable Court's opinions in Rummell v. Estelle (445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 [1980]), Hutto v. Davis (454 U.S. 370, 70 L.Ed.2d 556, 102 S.Ct. 703 [1982]), and Solem v. Helm, note 16, (463 U.S. 277, 290, 77 L.Ed.2d 637, 649, 103 S.Ct. 3001 [1983]), the Court of Appeals declined to engage in an extended proportionality analysis. Contrary to the Petitioner's assertions in the instant proceeding, the Court of Appeals did not suggest that the U.S. Constitution barred state appellate courts from engaging in proportionality review in any case. Rather, the Court held that the Federal Constitution did not mandate such a review in the case of a drug trafficker, who is sentenced to fifteen years imprisonment and who is eligible for "good time" and parole. In addition, on authority of various federal authorities, the Court of Appeals rejected Maddox comparative proportionality claim based

on the sentences subsequently received by his plea bargaining co-defendants. (Maddox v. State, __So.2d.__ [Ala.Crim.App, Sept. 9, 1986])

Subsequently, the Court of Appeals rejected Maddox's application for rehearing, and on January 30, 1987, the Alabama Supreme Court denied Maddox's certiorari petition, but declined to approve the Court of Appeals' reasoning. (Ex parte Maddox, __So.2d __[Ala,Jan. 30, 1987])

While the litigation proceeded on remandment to the Court of Criminal Appeals of Alabama, Maddox, Callahan and Gillum petitioned this Honorable Court for review of an unrelated issue. Such review was denied on November 3, 1986. (Maddox, et al. v. Alabama, __U.S.__, __L.F.2d __, 107 S.Ct. 404 [1986]).

STATEMENT OF THE FACTS

The undisputed evidence showed that Maddox was caught "red-handed" operating a large scale marijuana producing operation. (Maddox v. State, __So.2d.__[Ala.Crim.App, June 11, 1985]; Mns.Op. pages 1-5).

ARGUMENT

This is yet another case wherein Solem v. Helm (463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001 [1983]) is being cited as authority for a most bizzare theory of constitutional law. Compare Holley v. Smith, No. 86-6408, on the certiorari docket of this Honorable Court. As in Holley, the Petitioner here readily agrees that, objectively speaking, the sentence he received is proportionate. Yet, where, in Holley, it is claimed that Holley's sentence is disproportionate under Solem, because the trial judge had no sentencing discretion, here it is claimed that the sentence is dispropor-

tionate, because the trial judge had discretion to sentence persons convicted of trafficking to any term greater than three years imprisonment and excercised that discretion to sentence this Petitioner to fifteen years imprisonment and then, a year later, to sentence the Petitioner's co-defendants to lesser sentences recommended pursuant to plea bargains. It is most difficult to see how Solem stands for either proposition, let alone both.

Obviously, as the Petitioner concedes, a fifteen year sentence is proportionate punishment for operating a large scale marijuana growing operation. Compare Hutto v. Davis, 454 U.S. 370, 70 L.Ed.2d 556, 102 S.Ct. 703 (1982). Such sentence is even more appropriate in this case, since it was the Petitioner's second conviction for a serious violation of the controlled substances laws and in light of the other undisputed matters

set out in the pre-sentence report. Although the Petitioner is not eligible for parole until he has served three "calendar years" of his term,[5] he is eligible for "good time". Roberts v. State, 482 So.2d 1293 (Ala.Crim. App, 1985); cert. den. Under Section 14-9-41, Code of Alabama, 1975, the Petitioner could receive credit of 75 days for every 30 days he actually serves.[6] With "good time" the

---

[5]"(a) Notwithstanding the provisions of chapter 22, Title 15, [which provide for probation, parole, etc.] with respect to any person who is found to have violated this article, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this article." (Section 20-2-81, Code of Alabama, 1975)

[6]§14-9-41. COMPUTATION OF INCENTIVE TIME DEDUCTIONS.

"(a) Each prisoner who shall hereafter be convicted of any offense against the laws of the State of Alabama and is confined, in execution of the judgment or sentence upon any conviction, in the penitentiary or at hard labor for the county or in any municipal jail

Petitioner could be eligible for parole after serving less than fifteen (15) months and could serve the entire fifteen year sentence in six (6) years. In light of these considerations, any claim that the Petitioner's sentence is disproportionate would be frivolous. See Rummell v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980), cited and discussed with approval in Solem v. Helm, 463 U.S. 277, 300-303, 77 L.Ed.2d 637, 655-657, 103 S.Ct. 3001 (1983). Of course, as already noted, the Petitioner makes no such claim.

---

[6](Continued) for a definite or indeterminate term, other than for life, whose record of conduct shows that he has faithfully observed the rules for a period of time to be specified by this article may be entitled to earn a deduction from the term of his sentence as follows:

(1) Seventy-five days for each 30 days actually served, while the prisoner is classified as a Class I prisoner...."

The Petitioner raises, first, the issue of whether or not a state appellate court may engage in comparative proportionality reveiw of sentences. This issue can be desposed of quickly: Of course, they may! Alabama appellate courts regularly review death cases for comparative proportionality.[7] The issue here is whether the state appellate courts must provide such review, and the answer to that issue is no! Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1984)

The Petitioner's complaints about his co-defendants' sentences are irrelevant. These persons were sentenced pursuant to plea bargains. Why the District Attorney chose to enter these bargains does not appear on this

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[7]See, for example, Baldwin v. State, 456 So.2d 117, 128 (Ala.Crim.App, 1983); aff'd sub-nom. Ex parte Baldwin, 456 So.2d 129, 140 (Ala.1984); aff'd sub nom Baldwin v. Alabama, 472 U.S.__, 86 L.Ed.2d 300, 305-306, 105 S.Ct. 2727, 2730 (1985).

record.[8] The practice of sentencing defendants who plead guilty to less punishment than they would otherwise receive is the heart and soul of the universally accepted practice of plea bargaining. It is justified by many considerations, including the savings of judicial and other resources which results from a guilty plea and the fact that one who admits guilt has taken a long step toward rehabilitation and reform. The courts have universally approved of the sentencing of those who plead guilty to less punishment than those who do not. Two examples are sufficient to illustrate the point. In Smith v. Wainwright, (741 F.2d 1248, [11th Cir., 1984); cert. denied, __U.S.__, 85 L.Ed.2d 151, 105 S.Ct. 1883), the Court wrote:

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[8]The record also does not show whether or not Gillum and Callahan had any prior criminal history.

"VI. DISPARITY IN SENTENCING

"After the penalty hearing, the trial judge sentenced Smith to death. Wesley Johnson, in accordance with his plea bargain, received a sentence of only twenty-five years in prison. Smith contends that this disproportionate punishment violates the Constitution given his "lesser culpability" than Johnson. He requests this court to conduct an independent review of the record and grant relief on this issue, citing as support, Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). This contention lacks merit. See generally Pulley v. Harris, U.S. , 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984); Moore v. Balkcom, 716 F.2d 1511 (11th Cir.1983), cert. denied, U.S. 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); Henry v. Wainwright, 721 F.2d 990 (5th Cir. Unit B 1983), cert. denied, .U.S. , 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984)..." (741 F.2d 1248, 1259; emphasis supplied).

Some of the reasons for this are found in the discussion of a similar issue in Hitchcock v. Wainwright, (770 F.2d 1514 [11th Cir.,1985]) wherein the Court wrote:

"...A defendant who pleads guilty...is in a markedly different posture from a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed examination.

"Moreover, by pleading guilty a defendant confers a substantial benefit to the objectives of the criminal justice system:

'the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.'

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471.

> The heart of a plea bargain, from a defendant's point of view, is the option of avoiding a possibly harsher sentence after conviction at trial.
>
> Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. Blackmon v. Wain-wright, 608 F.2d 183 (5th Cir.1979), cert. denied, 449 U.S. 852, 101 S.Ct. 143, 66 L.Ed.2d 64 (1980)..." (770 F.2d 1514, 1519)

There is, of course, no claim nor basis for a claim of judicial vindictiveness in this case. Gillum and Callahan were sentenced more than a year after the Petitioner, on the basis of plea bargains entered nine months after the Petitioner's sentence. Since an effect cannot precede its cause, Petitioner's sentence could not be based on vindictiveness. The sentences of Gillum and Callahan are simply irrelevant to the Petitioner's sentence.

There is no authority for the proposition that a constitutionally proportionate sentence is rendered disproportionate by sentences received by other defendants under other circumstances.

CONCLUSION

In conclusion, the Respondent, the State of Alabama, respectfully submits that the decision and opinion of the Honorable Court of Criminal Appeals of Alabama are correct and in full accord with the authorities of this Honorable Court and the Constitution of the United States. Therefore, the said Respondent

respectfully submits that the writ ought to be denied and prays that it be denied.

Respectfully submitted,

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BY:

_____
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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama and one of the Attorneys for the Respondent, do hereby certify that on this _____day of April, 1987, I did serve the requisite number of copies of the foregoing on the attorney for the Petitioner, Richard M. Maddox, by mailing the same to said attorney, first-class postage prepaid and addressed as follows:

Honorable David Cromwell Johnson
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